91-586

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMAL A. KAHOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

GLEN A. STANKEE
RAYMOND & DILLON, P.C.
One East Broward Blvd.
Suite 1705
Fort Lauderdale, FL 33301
(305) 728-9500
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a warrant authorizing the seizure of all business records which are fruits, evidence, or instrumentalities of offenses under the general tax evasion and conspiracy statutes is sufficiently particular under the the Fourth Amendment where (i) the business was not shown to be "permeated with fraud," (ii) specific documents had been identified as the evidence of the offense, and (iii) the agent had previously acquired many of the records described in the warrant.

2. Whether the probable cause affidavit operates to limit the scope of the warrant where it is not attached to or otherwise incorporated in the warrant.

3. Whether the good faith exception to the exclusionary rule applies to a facially invalid warrant.

4. Whether the *de novo* review requirement of 28 U.S.C. § 636(b)(1) is satisfied where the motion to suppress hinges on the credibility of witnesses and the order of the district court, in adopting the report and recommendation of the magistrate, does not indicate that a transcript of the testimony informed its decision.

5. Whether the district court denied the Petitioner's right to due process in refusing to compel production of the special agent's notes and memoranda of her interview with the informant, as required under Rules 12(i) and 26.2 of the Federal Rules of Criminal Procedure, where probable cause was founded on the statements which the informant denied making at said interview.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ——

JAMAL A. KAHOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioner, Jamal A. Kahok, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit in the case of the United States of America v. Jamal A. Kahok, entered on August 19, 1991.

OPINIONS BELOW

The order of the Eleventh Circuit Court of Appeals, dated August 19, 1991, affirming the District Court's order is attached as Appendix A.

The Report and Recommendation of the U.S. Magistrate, dated January 30, 1990, is attached as Appendix B.

The order of the District Court, dated February 23, 1990, accepting Report and Recommendation of U.S. Magistrate, is attached as Appendix C.

JURISDICTION

(i) The judgment to be reviewed was entered by the United States Court of Appeals for the Eleventh Circuit on August 19, 1991.

(ii) No orders were entered respecting a rehearing or granting an extension of time within which to file the Petition for a Writ of Certiorari.

(iii) No cross-petition for a Writ of Certiorari is or will be filed under Rule 12(b)(3).

(iv) The Court's jurisdiction to review the judgment in question by Writ of Certiorari is conferred by Title 28, United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

This case involves the following provisions of the Constitution of the United States:

U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

This case involves the following statutory provisions:

28 U.S.C. § 636(b)(1).

> Notwithstanding any provision of law to the contrary—
>
> > (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
> >
> > (B) a judge may also designate a magistrate to conduct hearings including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, or any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitioners challenging conditions of confinement.
> >
> > (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such

proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objections is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

This case involves the following provisions of the Federal Rules of Criminal Procedure:

RULE 12(i).

(i) Production of Statements at Suppression Hearing. Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter.

RULE 26.2.

Production of Statements of Witnesses.

(a) Motion for Production. After a witness other than the defendant has testified on a direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) Production of Excised Statement. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) Definition. As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic

mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

STATEMENT OF THE CASE

Petitioner filed a motion to suppress evidence that was seized in August of 1986 pursuant to three search warrants that were issued upon the probable cause affidavit of a special agent of the Internal Revenue Service. The evidence consists of various business records relating to, *inter alia*, the operations of Petitioner's grocery stores. The affidavit purports to recount the incriminating testimony of an informant who previously managed one of those stores. According to the affidavit, Petitioner had instructed the informant to record the actual cash receipts of the store in an Arabic ledger and to report only 40% to 60% of the actual receipts on the daily sales reports that were sent to the accountant for preparation of Petitioner's tax returns.

The search warrants were issued as part of an investigation that had commenced at least ten months earlier with the issuance of an administrative summons to Petitioner's accountant. Many of Petitioner's business records were delivered to the special agent at that time. In fact, the special agent had obtained so many documents from the public records and third parties as to permit the computation of Petitioner's net worth for each of the several years under investigation. That computation is included in the probable cause affidavit.

The search warrants call for the seizure of business records and documents of every conceivable description [1]

[1] "Books, records, journals, ledgers, bank statements, receipts, invoices, documents, cancelled checks, and other items relating to JAMAL KAHOK, KAHOKS ENTERPRISES, INC., JAMAL & BROTHERS, LTD. CO., CROFT SUPERMARKET, JIMMYS SU-

of each of Petitioner's businesses, limited only by the requirement that the records evidence violations of the general tax evasion and conspiracy statutes for any period not then barred by the statute of limitations. The description of the records was not refined in any way to take into account the records already in the special agent's possession. It included the records of one business, Jamal & Brothers, Ltd., Co. that was not involved in the operation of the grocery stores. Although the special agent identified the evidence of the offense in the affidavit as (i) the Arabic sales ledgers, (ii) the daily sales reports, and (iii) coupon redemption records, none of those records were mentioned in the warrants.

The probable cause affidavit was not attached to the warrants.[2] The warrants do not incorporate the probable cause affidavit by reference. The executing agents seized, without limitation, all of Petitioner's records. Those which did not pertain to the taxable years 1980 through 1985 were later returned.

It was not alleged in the probable cause affidavit that Petitioner's grocery stores were "permeated with fraud." The affidavit details certain aspects of the operation of Petitioner's grocery stores and Petitioner's use of the alleged unreported income.

PERMARKET, PALS SUPERMARKET, and SAXON WALL SUPERMARKET, evidencing the obtaining, transferring, and/or concealment of income, expenses, assets and expenditures of money, which are fruits, evidence of [sic] instrumentalities of criminal offenses against the United States, namely attempts to evade of [sic] defeat Federal income taxes in violation of 26 U.S.C. 7201, subscribing to a fraudulent return in violation of 26 U.S.C. 7206(1), and conspiring to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Treasury Department in the collection of income taxes in violation of 18 U.S.C. 371.

Note: Documentary evidence is limited to the period from January 1, 1980 through and including December 31, 1985."

[2] In fact, the affidavit was sealed by the court in order to protect the confidentiality of the informant.

Without the incriminating statements attributed to the informant, the affidavit would not support a finding of probable cause. A suppression hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), was held before a magistrate in January of 1990. At the hearing, the informant denied making those incriminating statements. The special agent testified that the informant did make those statements and, consequently, the motion hinged on the credibility of these witnesses.

During the course of the suppression hearing, the special agent testified that she had notes of her interview with the informant, as well as a memorandum of that interview. The magistrate denied Petitioner's request for the production of those materials.

The magistrate rejected the informant's testimony as incredible and recommended that the motion to suppress be denied. Petitioner timely filed 31 pages of meticulously detailed objections to the magistrate's credibility determinations some time after 4:00 p.m. on February 22, 1990. He pointed out several instances in which the magistrate's recollections of crucial testimony [3] were contrary to the 200 page transcript. Despite the importance of those credibility determinations, the district court accepted the magistrate's report and recommendation on February 23, 1990. The order merely reflects that the court reviewed the magistrate's report and the record. None of Petitioner's specific objections were addressed and nothing in the order indicates that a reading of the transcript informed the court's decision.

In June of 1990, the Appellant entered into a plea agreement under which he preserved the right to appeal the district court's order. The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291. On August 19, 1991, that court affirmed the district court's order without opinion.

---

[3] At the time the magistrate issued her report and recommendation, the testimony had not been transcribed.

REASONS FOR GRANTING THE WRIT

Because the Eleventh Circuit did not issue an opinion, Petitioner must, to a limited extent, speculate as to its reasoning. However, the probable cause affidavit and warrants speak for themselves and, therefore, some inferences are possible. The Eleventh Circuit either determined that the description of the documents contained in these warrants were sufficiently particular under the Fourth Amendment, or that the good faith exception to the exclusionary rule applies. In reaching either conclusion, the Eleventh Circuit necessarily applied principles that conflict with those applied by the First, Second, Eighth, Ninth, Tenth, and/or District of Columbia Circuits.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICTS AMONG THE FIRST, SECOND, NINTH, TENTH, AND ELEVENTH CIRCUIT COURTS AS TO THE PARTICULARITY WITH WHICH BUSINESS RECORDS MUST BE DESCRIBED IN A WARRANT UNDER THE FOURTH AMENDMENT

In upholding these warrants, the Eleventh Circuit rejected the rule that warrants must describe the records to be seized with as much specificity as the government's knowledge and circumstances would allow. In this case, the warrants did not exclude the documents that were already in the special agent's possession. The specific records which were identified by the informant as the evidence of the offenses were not even mentioned in the warrants. Clearly, they could have been more specific. The Eleventh Circuit's endorsement of this "boilerplate" descriptions [4] conflicts with decisions of the First, Second, Ninth, and Tenth Circuits.[5]

---

[4] From the description contained in these warrants, it is not even possible to determine the nature of Petitioner's business.

[5] The Fourth Amendment requires that warrants "particularly describe[e] . . . the persons or things to be seized." U.S. CONST.

According to the First Circuit, the government must describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and "warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized." *United States v. Fuccillo*, 808 F.2d 173, 176 (1st Cir. 1987), *cert. denied*, 402 U.S. 905 (1987). " 'In light of the information available to the agents which could have served to narrow the scope of the warrant and protect the defendant's personal rights, the warrant was inadequate.' " (quoting *United States v. Klein*, 565 F.2d 183, 190 (1st Cir. 1977)). *Id.* at 176.

The Tenth Circuit holds that a warrant is flawed where information was available to the government to make the description of the items to be seized much more particular. *United States v. Leary*, 846 F.2d 502, 604 (10th Cir. 1988). "Where the affidavit in support of the warrant is very specific, but none of that information is included to limit the warrant, the warrant is not as particular as possible under the circumstances." *Id.* at 604.

---

amend. IV. This requirement prevents a "general, exploratory rummaging in a persons belongings," *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) and " 'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " *Stanford v. Texas*, 379 U.S. 476 (1965) (quoting *Marron v. United States*, 275 U.S. 192 (1927)). *See also Andresen v. Maryland*, 427 U.S. 463 (1976). "The particularity requirement insures that a search is confined in scope to the particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985). The "degree of specificity required necessarily depends on the circumstances of each particular case," *United States v. Strand*, 761 F.2d 449, 453 (8th Cir. 1985). *See also United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). The courts must "consider the totality of circumstances in determining the validity of a warrant." *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982).

The Ninth Circuit, in *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986) found that the government could have narrowed most of the descriptions in the warrants. "As the warrants stand, however, they authorize wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide no guidelines to distinguish items used lawfully from those the government had probable cause to seize." *Id.* at 964.

Similarly, in *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981) the Fifth Circuit said that the "failure to employ the specificity available will invalidate a general description and warrant."

In *United States v. Young*, 745 F.2d 733 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the court said that "[c]ourts tend to tolerate a greater degree of ambiguity where law enforcement agencies have done the best that could reasonably be expected under the circumstances, have acquired all the descriptive facts which a reasonable investigation could be expected to cover, and have insured that all those facts were included in the warrant." *Id.* at 759.

The Ninth Circuit holds that a warrant must be no broader than the probable cause upon which it is based. *See, e.g., United States v. Weber*, 923 F.2d 1338 (9th Cir. 1991); *Spilotro*. That principle was rejected by the Eleventh Circuit in this case. Here, the probable cause was based solely upon the failure to report all of the Petitioner's income. Probable cause did not exist for the seizure of records relating to expenses, assets, and expenditures. Furthermore, there was no probable cause for seizure of the records of Jamal & Brothers, Ltd., Co. which was not even involved in the operation of the grocery stores.

The Eleventh Circuit apparently determined that the warrants were sufficiently particular in that they listed various categories of records. The Second, Eighth, Ninth,

and Tenth Circuits have all held that a list which encompasses virtually every category of document is not a limitation at all.

In *Leary*, 846 F.2d 592 at 602, the Tenth Circuit held that a list of business records did not provide any meaningful limitation where the description encompassed virtually every document that one might expect to find in a modern export company's office. *See also In re Grand Jury Proceedings (Young)*, 716 F.2d 493, 498 (8th Cir. 1983) (where a "laundry list of various types of records" was insufficient to save the search warrant); *Roberts v. United States*, 656 F. Supp. 929, 934 (S.D.N.Y. 1987), *rev'd on other grounds*, 852 F.2d 671 (1988) (where "listing every type of record that could conceivably be found in an office" was not sufficiently limited).

In *Andresen v. Maryland*, 427 U.S. 463 (1976), a warrant included an exhaustive list of particularly described documents and an invitation to search for "other fruits, instrumentalities, and evidence of crime at this [time] unknown." *Id.* at 479. The Court upheld the validity of the warrant because the detailed list of documents operated to limit the general description.

Similarly, the Eighth Circuit has held that, where a general boilerplate description did not accompany a list of particularized documents, which tended to narrow the scope of the warrant, it was invalid. *United States v. Buck*, 813 F.2d 588 (2d Cir. 1987), *cert. denied*, 484 U.S. 857 (1987). The warrants in this case contained no particularized list of documents that could operate to limit the general description.

The Eleventh Circuit apparently determined that the warrants were sufficiently particular in that they limited the records to those which evidence violations under the general tax evasion and conspiracy statutes. The First, Eighth, Ninth, and Tenth Circuits hold that warrants only limited in that fashion are not valid. *See Roche v. United States*, 614 F.2d 6, 7 (1st Cir. 1980) (where the

court said that a warrant authorizing seizure of books, records, and documents "which are evidence, fruits, and instrumentalities of the violation of Title 18, United States Code, Section 1341 [mail fraud] was not limited at all"); *United States v. Abrams*, 615 F.2d 541, 542-543 (1st Cir. 1980) (where a warrant that was limited only by federal fraud statute was overbroad); *In re Lafayette Academy*, 610 F.2d 1, 3 (1st Cir. 1979) (where a warrant limited to items that evidence violations of 18 U.S.C. 286, 287, 1001, and 1014 was held invalid); *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987) (where references to the general conspiracy statute and general tax evasion statute did not limit the search in "any substantive manner"); *Spilotro*, 800 F.2d 959 at 965 (where a warrant limited only by reference to a criminal statute was held to be "inadequate"); *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982) (where a warrant limiting records to those evidencing violations of the general tax evasion statute of 26 U.S.C. § 7201 was invalid); *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985) (where a warrant authorizing seizure of all documents and records "which are evidence of violations of Title 18, United States Code, Section 371" was held invalid); *Leary*, 846 F.2d 592 at 601 ("where the statutes cover a broad range of activity, the reference to those statutes does not sufficiently limit the scope of the warrant").

The decision of the Eleventh Circuit in upholding the warrants in this case clearly conflicts with the decisions of the other circuit courts as to the particularity required to satisfy the Fourth Amendment. That conflict should now be resolved by this Court.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE FIRST, SECOND, NINTH, TENTH, AND ELEVENTH CIRCUIT COURTS AS TO THE APPLICATION OF THE "PERMEATED WITH FRAUD" EXCEPTION TO THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT

In *Marron v. United States*, 275 U.S. 192 (1927) the Court said "as to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *See also Stanford v. Texas*, 379 U.S. 476 (1965). In this case, the executing officers were called upon to decide which documents evidence offenses under the general tax evasion and conspiracy statutes and which did not. Nothing in the warrants provided guidance on how that was to be determined. "If items that are illegal, fraudulent, or evidence of illegality are sought, the warrant must contain some guidelines to aid the determination of what may or may not be seized." *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982). Where a warrant provides no such guidelines, it is impermissibly overbroad on its face. *United States v. Leary*, 846 F.2d 592, 602 (10th Cir. 1988).[6]

As discussed above, the circuit courts that addressed the issue have held that warrants limited only by the requirement that the records evidence a violation of a statute are not limited at all. Those warrants must be tested under the Fourth Amendment as general warrants.

In limited circumstances, general warrants have been upheld where they authorized the seizure of records of a

---

[6] "The constitutional standard for "particularity of description in the search warrant is that the language be sufficiently definite to enable the searcher reasonably to ascertain and identify the things authorized to be seized." *United States v. Strand*, 761 F.2d 449, 453 (8th Cir. 1985); *see also United States v. Wuagneux*, 683 F.2d 1343, 1348 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). *See also* 2 LaFave, § 4.6(a); 3 C. Wright, Federal Practice and Procedure § 670, at 720-22 (2d ed. 1982). See note 5, *supra*.

business that was "permeated with fraud." In *United States v. Offices Known as 50 State Distributing Co.*, 708 F.2d 1371 (9th Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984), the Ninth Circuit upheld a warrant authorizing the seizure of virtually all business records where the probable cause affidavit evidenced a pervasively fraudulent operation which encompassed the entire business. Since it called for all records, left was nothing to the discretion of the executing officers. The court found that it was not possible through a more particular description to segregate business records evidencing the fraud from those that do not because there was probable cause to believe that fraud permeated the entire business operation. *Id.* at 1374.

Similarly, in *United States v. Brien*, 617 F.2d 299 (1st Cir. 1980), *cert. denied*, 446 U.S. 919 (1980), a general warrant authorizing the search of the premises of a company believed to be engaged in the fraudulent sale of commodities options was upheld. The government had received 250 complaints from commodities customers. Probable cause was not limited to evidence as to those particular complaints because it could be fairly inferred that they were just the "tip of the iceberg." *Id.* at 308. The court concluded that the facts presented to the magistrate indicated that the commodities operation was entirely a scheme to defraud and that the records evidencing fraud were not segregable from those that did not. *See also National City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980) (where a warrant authorizing seizure of all business records was upheld where there was probable cause to believe that the business was "permeated with fraud"); *United States Postal Service v. C.E.C. Services*, 869 F.2d 184 (2d Cir. 1989) (where the court said that a general warrant will not offend the particularity requirement where criminal activity pervades the entire business).

In *United States v. Sawyer*, 799 F.2d 1494 (11th Cir. 1986), the Eleventh Circuit upheld a warrant that was

limited only by a list of records and documents and two federal statutes, after noting that the business was "permeated with fraud and . . . this fraud affected all [the defendant's] customers." *Id.* at 1508.

In clarifying the nature of the "permeated with fraud" exception to the particularity requirement, the Ninth Circuit distinguished *50 State* from cases such as *Cardwell*, (where a general warrant issued as part of a tax investigation of a legitimate business was held invalid). 708 F.2d at 1375. In *Cardwell*, as here, the government's investigation had already focused on certain parts of the defendant's business records. No such focused search is possible where the entire operation was fraudulent. 708 F.2d at 1375.

Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747, 750 (9th Cir. 1989), involved a warrant that was supported by an affidavit containing 22 instances of alleged mispresentation, all involving the work of one artist. The Ninth Circuit held the warrant to be invalid because only approximately 22% of the business was attributed to that particular artist. The affidavit did not aver that evidence of that artist's fraud was inseparable from other documents or that the corporation was "permeated with fraud." *See also United States v. Washington*, 797 F.2d 1461, 1473 (9th Cir. 1986) (where the court said that the government must make the required showing that the business is "permeated with fraud" to qualify under the *50 State* exception.

In *United States v. Appoloney*, 761 F.2d 520 (9th Cir. 1985), *cert. denied*, 474 U.S. 949 (1985), the Ninth Circuit upheld a general warrant that was issued to investigate tax evasion and failure to file a wagering tax return in connection with a gambling operation. Again, the court distinguished *Cardwell* on the grounds that the IRS had already reviewed the corporation's books and knew specifically which books it required in its criminal

investigation. "The extent of the government's advance knowledge was critical to our holding." 761 F.2d at 524.

United States v. Stubbs, 873 F.2d 210 (9th Cir. 1989), involved a warrant authorizing the seizure of records of virtually every description in connection with a tax investigation. The warrant merely described broad classes of documents without a specific description of the items to be seized. Because the affidavit failed to provide probable cause for a reasonable belief that tax exasion permeated the taxpayer's entire real estate business, the Ninth Circuit refused to apply the "permeated with fraud" exception. *Id.* at 211. Instead, the affidavit, like the one involved here, merely detailed certain aspects of the operation which were used to evade taxes. Because there was no probable cause to seize all documents, the warrant was defective in that it did not provide objective standards by which an executing officer could determine what could be seized.

The justification for the "permeated with fraud" exception is that particularity may not be possible where the fraud is so pervasive that it touches virtually every aspect of the business. In those cases, the government's legitimate interest in investigating criminal offenses should not be thwarted by the inability to segregate and particularize records which evidence fraud. Even the Eleventh Circuit previously held that the general warrant is valid only if "the description is as specific as the circumstances and the nature of the activity under investigation permit." *United States v. Santarelli*, 778 F.2d 609, 614 (11th Cir. 1985) (involving a racketeering operation).

The material facts of this case are indistinguishable from those of *Cardwell* and *Stubbs*, yet the Eleventh Circuit reached the opposite conclusion from that reached by the Ninth Circuit.[7] This appears to be the first case in

[7] In *United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989) the Ninth Circuit left open the possibility that tax evasion could

which a general warrant issued to a legitimate business in connection with a routine tax investigation was ever upheld. Here, it was not even alleged that the Petitioner's businesses were "permeated with fraud."[8] The affidavit merely details the aspects of the business used to evade taxes. As the Ninth Circuit held in *Stubbs*, that is insufficient to apply the "permeated with fraud" exception.[9]

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE NINTH, TENTH, ELEVENTH AND DISTRICT OF COLUMBIA CIRCUIT COURTS AS TO WHETHER A PROBABLE CAUSE AFFIDAVIT MUST BE ATTACHED TO AND INCORPORATED IN A WARRANT TO BE CONSIDERED A LIMITATION ON THE SCOPE OF THE WARRANT

Most courts hold that a probable cause affidavit will operate to limit the description of records and to cure the generality of the warrant only where the affidavit is

---

"permeate" a legitimate business, thereby justifying the application of the "permeated with fraud" exception. The affidavit in that case, however, failed to provide probable cause for a reasonable belief that tax evasion permeated the taxpayers real estate business. Instead, it simply detailed certain aspects of the operation which were used to evade taxes. That is all that can be said of the affidavit involved in this case. It alleges that something less than all of the sales receipts were reported to the accountant and that there may have been unreported income from the redemption of coupons. Beyond that, the affidavit merely discusses the Petitioner's use of the unreported income.

[8] The affidavit discloses a prior incident in which Petitioner was arrested in connection with a fraudulent coupon redemption scheme. That was not the subject of this investigation. Furthermore, he was arrested as part of a sting operation for agreeing to participate. It is not alleged that he redeemed any coupons or generated any income from that activity.

[9] If the Eleventh Circuit determined that Petitioner's businesses were "permeated with fraud," it did so by applying a test which conflicts with that applied by the Ninth Circuit in *Stubbs*.

"attached to and incorporated by reference in the warrant . . ." *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986). The Tenth Circuit holds that an affidavit may cure an overbroad warrant only "where the affidavit and the search warrant . . . can be reasonably said to constitute one document. Two requirements must be satisfied to reach this result: first, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference." *United States v. Leary*, 846 F.2d 592, 603 (10th Cir. 1988). *See also United States v. Strand*, 761 F.2d 449 (8th Cir. 1985) (where the affidavit accompanied the warrant but was not incorporated); *United States v. Maxwell*, 920 F.2d 1028 (D.C. Cir. 1990).

The Tenth Circuit holds that, even if the technical requirements for incorporation were met, it is improper to allow the affidavit to cure the lack of particularity in the warrant where the government agents relied on the breadth of the warrant, not the specificity of the affidavit, to define the scope of the search. *Leary*, 846 F.2d 592 at 603. In this case nothing in the affidavit limited the scope of the search. All of Petitioner's records were taken.

The Eleventh Circuit does not require that the affidavit be attached or incorporated into the warrant by reference to limit its scope. *United States v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). The affidavit in this case was apparently considered in testing the scope of the warrant.

The decision of the Eleventh Circuit conflicts with those of the Ninth, Tenth, and District of Columbia Circuits on the issue of whether an affidavit must be attached to, and incorporated by reference in, the warrant to be considered a limitation on its scope. This conflict should now be resolved by this Court.

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE FIRST, NINTH, TENTH, AND ELEVENTH CIRCUIT COURTS AS TO THE APPLICATION OF THE GOOD FAITH EXCEPTION TO FACIALLY INVALID WARRANTS

If the Eleventh Circuit determined that the warrants were overbroad and that the "permeated with fraud" exception did not apply, it necessarily determined that the good faith exception to the exclusionary rule applied. In that event, this case represents the first instance in which the good faith exception was applied to a facially invalid warrant (i.e., in that it authorizes the seizure of all records) directed to a business which is not alleged to be "permeated with fraud." [10]

In *United States v. Leon*, 468 U.S. 897 (1984), the Court held that evidence obtained pursuant to a facially valid search warrant, later found to be invalid, was admissible if the executing officers acted in good faith and in objectively reasonable reliance on the warrant. The Court held that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity". *Id.* at 919. In applying *Leon*, the courts should "eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant." *Id.* at 922 n.23. The inquiry should be "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."

In *Leon*, the Court noted three instances where, although the officer has acted in good faith, suppression

[10] Prior decisions of the circuit courts have upheld general warrants only where they were directed to businesses that were "permeated with fraud." Only under those circumstances could be executing officer reasonably believe that a general warrant was valid. In this case, the affidavit contained no allegations that the business was "permeated with fraud."

remains an appropriate remedy: (i) the magistrate wholly abandoned his judicial role; (ii) no reasonably well trained officer should rely on the warrant; and (iii) a warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid. *Id.* at 923.

Leon involved a facially valid search warrant subsequently held to be invalid by a lack of probable cause. In *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the Court applied the good faith exception to a warrant that was later held to violate the Fourth Amendment's particularity requirement. In upholding the warrant in *Sheppard*, the Court focused on the conduct of the applicant in obtaining assurances that the warrant was sufficient.[11] The Second Circuit upheld a general warrant in *United States v. Buck*, 813 F.2d 588 (2d Cir. 1987), *cert. denied*, 484 U.S. 857 (1987), upon finding that the officers made considerable efforts to comply with the dictates of the Fourth Amendment.[12] The court's decision,

---

[11] In *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) a Boston police officer obtained a warrant authorizing the search of Sheppard's residence based on evidence obtained during a homicide investigation. The only warrant applicable available to him was a preprinted narcotics search warrant. The judge signed and dated the warrant after making several changes in the wording, but did not change the substantive portion of the warrant. It continued to authorize a search for controlled substances. Also, he did not alter the form so as to incorporate the affidavit. Nevertheless, the judge assured the officer that "the warrant was sufficient authority in form and content to carry out the search as requested." *Id.* at 986. The Court held that the officer reasonably relied on the judge's determination and that the exclusion of the evidence would not further the goal of the exclusionary rule—deterring police misconduct.

[12] Those efforts included (i) seeking out a neutral magistrate, (ii) tape recording the conversation with the magistrate to assure accuracy, (iii) outlining the crime for the magistrate, (iv) describing the evidence that led them to the house, and (v) swearing to the truth of the assertions. *Id.* at 592-593.

however, was based in part on the fact that the law concerning the particularity requirement was theretofore unsettled and that a reasonably well trained officer could not be expected to know that the warrant violated the Fourth Amendment.[13]

The First Circuit has been unwilling to apply the good faith exception where the executing agents were "armed with warrants already drawn in the broadest manner." *United States v. Fuccillo*, 808 F.2d at 177. The Ninth Circuit holds that an executing officer may never reasonably rely on a warrant that is facially invalid because it fails to particularize the evidence to be seized. "Here, the warrant is deficient because it is overbroad and does not describe any particular property. We hold that the agent could not reasonably rely on the warrant." *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985). *See also Center Art Galleries—Hawaii, Inc. v. United States*, 875 F.2d 747, 752 (9th Cir. 1989) (where the court said that the warrants were "so overbroad as to be facially invalid, thereby precluding good faith reliance on the validity of the warrant"); *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989) (where the court said "the good faith exception is not available where "the executing officer simply could not have reasonably relied on a facially deficient warrant'" (citing *Leon*). "The warrant was not facially valid, and thus could not have been relied upon in good faith as valid."). *See also United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986) (holding that executing officers could not reasonably presume that a facially overbroad warrant was

[13] The court noted that the jurisdiction in which the officers were operating, the Third Circuit, had not spelled out the particularity requirement prior to the time the police applied the warrant. Because of the unsettled state of prior law, the court determined that a reasonably well trained police officer could not be expected to know that the warrant violated the Fourth Amendment. Presumably, the law became settled on March 20, 1987, the date that *Buck* was decided and facially invalid warrants issued after that date would not qualify under the good faith exception in the Second Circuit.

valid); *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988) (where the court said that the warrant was so facially overbroad that the executing agents could not have believed that they were authorized to search for all of the documents described by them).

The Eleventh Circuit has adopted a position which conflicts with those of the First, Ninth, and Tenth Circuits. In *United States v. Accardo*, 749 F.2d 1477 (11th Cir. 1985), *cert. denied sub nom.*, which involved a labor racketeering operation, the court decided as a matter of law that the good faith exception applied in the case of facially invalid warrants. It specifically stated that the warrant's authorization to seize "all corporate records" did not transgress the limitation on the good faith exception involving warrants "'so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid'." *Id.* at 1481 (quoting *Leon*, 468 U.S. at 923). The case was then remanded to the district court for hearing on the good faith issue.

In *United States v. Norton*, 867 F.2d 1354 (11th Cir. 1989) the Eleventh Circuit again applied the good faith exception to a warrant that was facially invalid in that it authorized the seizure of "all corporate records which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code." *Id.* at 1360. Satisfied that the agents "took every step that could reasonably be expected of them," including the submission of an "affidavit detailing the pervasive fraud" which was reviewed and approved by several prosecutors before its presentation to a magistrate, the Eleventh Circuit held that good faith was established. "[G]iven the permeative character of the fraud involved, we find that the agent's belief was objectively reasonable." *Id.* at 1360.

Although certiorari was denied in *Norton*, Justice White noted the conflict between that case and the Ninth

and Tenth Circuit decisions in *Center Art Galleries—Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989) and *Leary*, 846 F.2d 592. He recommended that the conflict be resolved. *McMonagle v. Northeast Women's Center, Inc.*, 123 U.S. 456, 458 (1990) (White, J., dissenting).

Review of the decision in this case is even more compelling. *Norton* and *Accardo* each involve racketeering activities that were "permeated with fraud." Because of the cases in which general warrants have been upheld in those circumstances, an executing officer could arguably have reasonably relied upon a facially overbroad warrant in those limited circumstances. *But see Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985).

Here, the Eleventh Circuit apparently applied the good faith exception to a facially invalid warrant directed to a legitimate business, whose operations were not alleged to be "permeated with fraud," in a routine tax investigation. The record is devoid of any indication that the special agent took any of the steps described in *Sheppard*, *Buck*, or *Norton* to obtain assurances that the warrants would be upheld. In upholding these warrants, the Eleventh Circuit has abandoned any basis for reconciling its views with those of the Ninth or Tenth Circuits. Its decision signals the demise of the exclusionary rule as a means of preserving the particularity requirement of the Fourth Amendment. Accordingly, the conflict should be resolved by this Court.

V. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT AND THE ELEVENTH CIRCUIT AS TO THE DISTRICT COURT'S DUTY TO CONDUCT A *DE NOVO* REVIEW OF A MAGISTRATE'S REPORT AND RECOMMENDATION UNDER 28 U.S.C. § 636(b)(1)

The Eleventh Circuit rejected the Petitioner's argument that the district court was obliged to satisfy the reviewing court that it conducted a *de novo* review, as re-

quired under 28 U.S.C. § 636(b)(1), in adopting the magistrate's report and recommendation. This result conflicts with the result reached by the Fifth Circuit in *United States v. Elsoffer*, 644 F.2d 357 (5th Cir. 1981).

In *Elsoffer*, as here, the district court's order failed to reflect with certainty that the trial judge actually read the transcript of the suppression hearing before denying the motion. The court said "an appellate court must be satisfied that a district judge has exercised his non-delegable authority by considering the actual testimony, and not by merely reviewing the magistrate's report and recommendation." *Id.* at 359.

In this case, the order of the district court did not indicate that a *de novo* review of the transcript was conducted, despite the fact that the motion hinged on the credibility of the witnesses. The circumstances demonstrate that a meaningful *de novo* review could not have been conducted in this case.

The magistrate's report and recommendation was adopted only one day after the Petitioner filed 31 pages of meticulous objections to the magistrate's various credibility determinations.[14] Those issues could not be resolved without careful study of the 200 page transcript. Under these circumstances, the appellate court could not be satisfied that the district judge exercised his non-delegable authority in considering the actual testimony.

The Eleventh Circuit has recently held that a *de novo* review is presumed to have occurred, regardless of the language in the order, and that the burden is upon the Petitioner to prove otherwise. *Diaz v. United States*, 930 F.2d 832 (11th Cir. 1991). Despite the compelling circumstances in this case, the Eleventh Circuit determined that the Petitioner failed to meet that burden.

---

[14] The record shows that the objections were filed some time after 4:00 p.m. on February 22, 1990. The report and recommendation was adopted some time on February 23, 1990.

This decision of the Eleventh Circuit conflicts with the Fifth Circuit as to whether the burden of proving that a *de novo* review did or did not occur lies with the district court or the party aggrieved by the decision. That conflict should now be resolved by this Court.

VI. CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE ELEVENTH CIRCUIT THAT THE PETITIONER'S RIGHTS TO DUE PROCESS WERE NOT DENIED WHEN THE DISTRICT COURT REFUSED TO COMPEL PRODUCTION OF THE SPECIAL AGENT'S NOTES AND MEMORANDA OF HER INTERVIEW WITH THE INFORMANT AS REQUIRED UNDER RULES 12(i) AND 26.2 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Eleventh Circuit, in affirming the order of the district court, determined that the Petitioner's right to due process was not denied when the magistrate refused to order production of the special agent's notes and memoranda of her interview with the informant. Petitioner was clearly entitled to those documents under Rules 12(i) and 26.2 of the Federal Rules of Criminal Procedure.

The probable cause for issuance of the warrants in this case was predicated upon the discussions that transpired during those interviews.[15] Nothing could be more revealing of the credibility of the special agent and the informant than those notes and memoranda. Without them, the hearing was so patently unfair as to deny the Petitioner's right to due process.

The decision of the Eleventh Circuit on this issue has so far departed from the accepted and usual course of

---

[15] Without the statements attributed to the informant, the affidavit was utterly lacking in probable cause. At the suppression hearing, the informant denied making those statements to the special agent. The special agent testified that he did make those statements at the interviews and that she had notes and memoranda of those conversations.

judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

The writ of certiorari should issue and the judgment of the Eleventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

GLEN A. STANKEE
RAYMOND & DILLON, P.C.
One East Broward Blvd.
Suite 1705
Fort Lauderdale, FL 33301
(305) 728-9500
Attorney for Petitioner

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5794

D. C. Docket No. 89-6145-CR-PAINE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMAL A. KAHOK,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 19, 1991)

Before TJOFLAT, Chief Judge, HATCHETT, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-6145-CR-PAINE

UNITED STATES OF AMERICA

vs.

JAMAL A. KAHOK

REPORT AND RECOMMENDATION

This cause came before the Court on Order of Reference from United States District Court Judge James C. Paine (DE 46), referring to this Court for a report and recommendation the Defendant's Motion to Suppress (DE 40).

This Court set the matter for a *Franks* Hearing on the Motion to Suppress and held an Evidentiary Hearing with respect to the same on January 23, 1990.

FACTS

On August 11, 1986, the Honorable Lurana S. Snow, United States Magistrate, Southern District of Florida Northern Division Fort Lauderdale, Florida, signed three search warrants for properties in which the Defendant, Kahok, allegedly has an interest. These three properties are known as Saxon and Wall Supermarket, hereinafter referred to as Saxon, Jamal and Brothers Ltd., Company, hereinafter referred to as Jamal, and Croft Supermarket,

hereinafter referred to as Croft. These bear case numbers 86-4297-SNOW, 86-4298-SNOW, 86-4299-SNOW. The underlying affidavit for these search warrants and the probable cause with respect thereto, is basically the same with respect to all three warrants.

The Defendant moves to suppress the fruits of those search warrants on the grounds that the special agent for the Internal Revenue Service made materially false statements which she knew to be false at the time she prepared the affidavit or that she made those statements in reckless disregard of the truth thereof. The Defendant also claims in his motion that the false statements made by Special Agent Jackson were necessary to the finding of probable cause. See *Franks v. Delaware*, 438 U. S. 154, 98 S.Ct. 2674 (1978). For purposes of the *Franks* Hearing, the Defendant Kahok offered exhibit #11, a copy of the affidavit of Christine Jackson, Special Agent of Internal Revenue Service, which formed the basis for the search warrants, and highlighted with a yellow marker each portion of the affidavit which the Defendant believes that Special Agent Jackson knowingly falsified or placed into the affidavit with reckless disregard of the truth thereof.

The Defendant called eight (8) witnesses to the stand who allegedly would prove the allegations of the Motion to Suppress.

The affidavit of Christine Jackson forming the basis of the application for the search warrant, basically alleges that Agent Jackson was conducting an investigation of the Defendant in 1985 and 1986, and during the course of that investigation a person by the name of Mahammed Hazien came to the Internal Revenue Service office in the Federal Building in Fort Lauderdale. Hazien came to complain that he had been fired from his job by Kahok and that he wished to report that Kahok was underreporting his income to the Federal Government and that

he, in fact, kept ledgers as to the actual business transactions of his grocery stores in Arabic diaries (one of which Hazien maintained himself) and that the true proceeds of the busines were concealed from the Internal Revenue Service. Agent Jackson's affidavit detailed the businesses owned by Kahok, et al., and described their locations and titled owners.

For purposes of the search warrant affidavit Special Agent Jackson referred to Mohammed Hazien as SX. Special Agent Jackson alleges that SX came to the Internal Revenue Service and told her that Kahok and Kahok Enterprises were not reporting or paying his employment taxes properly, that SX had been fired by Kahok and that when he went to apply for unemployment compensation there was no record of his having worked for Kahok. Further upon confronting Kahok with this fact, Kahok stated that SX was never on the reported payroll. Jackson's affidavit further states that SX worked at several stores during his employment with Kahok and that he was responsible for the daily operations of the grocery store. The affidavit alleges that SX's duty was to create and maintain in Arabic the original cash receipts and disbursements journal. It alleges that SX was in frequent contact with other employees from Kahok's grocery stores and that Kahok had instructed all employees to follow the same operational procedures. It alleged that SX has been inside business premises described above numerous times. SX described the layout of the store, the office, the types of records maintained and the locations of the records within the store. The affidavit further alleges that SX wishes to remain anonymous because Jamal Kahok and his extended family are very wealth and powerful in South Florida, and SX fears physical harm if Kahok learns that SX provided information to the Internal Revenue Service.

Since the execution of the search warrant in August of 1986, the confidential informant SX (Mahammed

Hazien) has given a sworn statement to the Defendant in this case. Mr. Hazien apparently alleges in that statement that he appeared at the Internal Revenue Service office on only one occasion and that was to inquire about his and his wife's own tax matters and that he did not discuss the Defendant Kahok at that time. Defendant alleges that it is untrue that Hazien's quarterly tax reports to the Unemployment Compensation Fund could not be found by the Internal Revenue Service, because the present records clearly reveal Hazien as an employee of Kahok Enterprises. The Defendant alleges that pursuant to a summons issued by the Internal Revenue Service that Special Agent Jackson had in her possession records proving payments to the Florida Unemployment Compensation Fund for the witness Hazien. Those records were provided "by the Defendant" on December 18, 1985, six months prior to her interview with Mr. Hazien.

The testimony of both Mr. Hazien and his wife and Special Agent Jackson contradicts the allegations made by Defendant, Kahok, in his Motion to Suppress. This Court finds that Mr. Hazien did, in fact, go to the Internal Revenue Service office and did, in fact, discuss the illegal conduct of the Defendant, Kahok, at the Internal Revenue Service office. Contrary to the allegation that Hazien never discussed Kahok at the time he was in the Internal Revenue Service office, it was Hazien's mention of Kahok's name which triggered the interest of the Internal Revenue Service agents because they were already involved in an investigation of Kahok. Therefore, this Court finds that allegation by Defendant, Kahok is without merit.

As to the allegation that Agent Jackson had before her in Kahok's records proof that Hazien was covered properly by Kahok with Florida Unemployment Compensation, that allegation is also without merit. By the Defendant's own statement, the records in Agent Jackson's possession only went up to December 1985. Kahok ap-

peared at the Internal Revenue Service office in June of 1986. His stated reason for being there was that he came from the Unemployment Compensation office and they had no record of him at Kahok's. This was confirmed by Hazien's wife, the Defendant's own witness. Additionally, Richard Harris, an accountant who testified for the Defendant stated that it takes months for Tallahassee to put hand-written records of payments of unemployment compensation into the computer. Therefore, Agent Jackson had nothing before her to show that Hazien's unemployment compensation was paid by Kahok and, in fact, had only evidence to the contrary.

Next, Defendant asserts that Agent Jackson lied when she placed in the affidavit that Mr. Hazien stated that he was fired by the Defendant. Hazien denies being fired by the Defendant although he states he left because he was asked to take a reduction in salary which he refused. At the hearing, Hazien testified that he, "was terminated at Saxon Walls in July 1986". Those are the witness's very own words at the suppression hearing. To say that the agent lied in the application when she stated Hazien said he was fired is at best splitting hairs and at worst a Rule 11 violation by counsel for the Defendant. Next, Defendant contends that the agent lied when she stated that Hazien stated he worked at several stores during his employment with the Defendant. Counsel for the Defendant claims that if that were true, "he may be competent to testify as to the operations of those stores," however, counsel for the Defendant states that Hazien worked at only two stores, Pals and Saxon & Walls.

The evidence at the suppression hearing, however, is that Hazien worked at three supermarkets; Jimmys, Pals, and Saxon and that he regularly went to Croft's to turn over the receipts from the store. This is by Hazien's own testimony at the suppression hearing. Therefore, this allegation is without merit.

Agent Jackson stated in her affidavit that Hazien was instructed by the Defendant to create and maintain a cash receipts and disbursements journal in Arabic. The motion claims that Hazien maintained the journal for his own purposes but denied that he was instructed to do so by the Defendant. Mohammed Hazien testified at the suppression hearing that he did, in fact, keep an Arabic journal but that he kept it for his own purposes. The witness then contradicted himself during the hearing and stated that it was one of his duties to keep the journal. Upon being pressed further Hazien stated that he kept the journal but that the affidavit was incorrect when it stated that he created the journal. He then stated that the journal was in place and being maintained at the time he became manager of one of the grocery stores and he was instructed by the prior manager of the store to keep up the journal in the manner that it had been kept up prior to his arrival.

It must be noted in the record that Hazien's testimony was replete with conflicts and inconsistencies. His statements are not only inconsistent with prior statements that he made himself but were also inconsistent with statements made by his wife.

The defense motion claims that the affiant lied when she stated that the witness, Hazien (SX), "has been inside the business premises described above numerous times". It is clear that this statement does not refer to the grocery stores delineated by counsel for the Defendant but refers to the paragraph above in the affidavit. Thus, counsel's grounds again are found to be without merit.

Though Hazien now denies giving the agents descriptions of locations of buildings and diagrams therein, he was unable to deny that the very diagrams produced by the Government were, in fact, drawn by him personally.

The motion to suppress filed by the Defendant claims that Mr. Hazien never asked to remain anonymous nor

did it state that he feared physical harm from the Defendant.

Mr. Hazien, himself, testified at the suppression hearing that he asked Special Agent Jackson not to tell anybody that he was providing information, especially not employees at the store. Hazien's wife testified at the suppression hearing in response to question by counsel for the Defendant that, yes, in fact, she did feel threatened as did her husband by the Defendant Kahck. She testified that she does not speak Arabic so she cannot tell exactly what was said on the telephone between her husband and another, but that she was aware that the Defendant, Kahok, was upset because she and her husband "snitched him out". She was visibly frightened as she testified and confronted the Defendant at the suppression hearing.

Hazien now denies that he told Special Agent Jackson that the Defendant, Kahok, would call the store daily and would arbitrarily reduce the total sales figures by forty (40) to sixty (60) percent from the actual records for the days business. This Court is not surprised that Hazien now denies ever having made such a statement. Nonetheless, this Court finds by clear and convincing evidence that Hazien did, in fact, make such a statement and that the totality of the circumstances in this case require a finding that Mr. Hazien is not now being truthful.

Defendant alleges that Special Agent Jackson made allegations concerning coupon redemption clearing houses that were false. The evidence in the record does not sustain that allegation. Defendant would have us believe that Special Agent Jackson was bound to determine that inflated figures on coupon forms filed by Nofal Kahok were not available to her as probable cause as she had a duty to discover and realize that Kahok had inflated the figures. A business man's assertion of his gross receipts is certainly a fact to be considered in reaching probable cause as to what his gross receipts actually are. There

is no evidence in the record that Agent Jackson knew that Nofal's figures of gross receipts were, in fact inflated. Other than Nofal Kahok's testimony that someone told him to fill those figures in on a application which he signed, there is no other evidence. Nofal Kahok's testimony is not believable. He would have the Court believe that as an astute businessman owning over five (5) grocery stores, that he was duped into placing a highly inflated figure as to his gross receipts or to a form which he filled out for a person whom he had just met.

Defendant complains that the Special Agent attempted to mislead the Court with respect to two different contracts executed by the Defendant and DeWitt for the purchase of Croft's Supermarket. The Court has reviewed these contracts. While on its face the contract of December 10, 1982, for $180,000.00 seems to be a copy of a legitimate contract, the December 20, 1982, contract appears to have been xeroxed to reflect signatures not on the original document. The Court has her own questions as to the validity of these documents and their import.

Counsel for the Defendant states that the 20th of December contract is merely the price of the good will of the store. However, the contract is not simply for good will, it affirmatively appears on the fact of the contract that it is for fixtures and inventory including the lease. Again, Defendant's motion is not well taken.

The Government concedes that Special Agent Jackson was mistaken when she stated that Mr. Hazien was a U. S. citizen. He did not receive his citizenship until later.

With respect to the allegation that the Special Agent denies that the tax returns for 1984 and 1985 were filed with the Internal Revenue Service as of August 11, 1986, the testimony at the hearing reflects that those tax returns were filed in the summer of 1986 and may not have been available to Special Agent Jackson as of the time of her search warrant.

The testimony of Allison Craig is of the gravest of concern to this Court. Witnesses at the hearing testified that Allison Craig was the bookkeeper for Croft's Supermarket. Allison Craig, however, testifies that she was a mere secretary and not responsible for records. She did testify at the hearing however, that several months after register tapes were retrieved from registers, they would be "thrown away by any employee who happened to be walking through the office". Allison Craig also testified, though the Government introduced into evidence her affidavit making incriminating statements against Kahok, that she never made such statements and did not read the affidavit she signed. Craig admitted, under oath however, that her signature appears on every page of her statement and, in fact her initials appear nine times on the document where she made corrections as to the contents of that document. She now states that she never read the document and was not aware of its contents at the time she signed it and initialed all the changes. Not only is this testimony not worthy of belief, this Court recommends that the Government pursue an investigation of perjury charges against Allison Craig.

Defense counsel claims that the Special Agent lied when she stated that she showed Allison Craig a copy of the Arabic diary. He claims that she could not have seen the diary since she made her statement in May of 1986, and the diary was not seized until August. However, clearly on the face of the statement itself it shows a date of November 1986. On that date Allison Craig admits that she was in the Internal Revenue Service office and that it was at that date she signed her statement. The Arabic diary was in the possession of the Government at that time and not as stated in Defendant's motion to suppress.

This Court finds that the testimony produced by the Defendant was not only woefully lacking in substance, it was woefully lacking in truth. This Court recommends to the District Court that the Motion to Suppress be summarily DENIED.

This Court also finds the Defendant's allegations that the search warrant was too broad, to be without merit. See *U.S. v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982). ". . . the Supreme Court has recognized that effective investigation of complex white-collar crimes may require the assembly of a 'paper puzzle' from a large number of seemingly innocuous pieces of individual evidence: "The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." *Id.* at 1349. See also *U.S. v. Abrams*, 615 F.2d 541 (1st Cir. 1980), wherein Campbell in a concurring opinion stated investigators in fraud cases do not and often cannot know in advance what precisely they will find in files.

"It is universally recognized that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit." *Wuagneux* at 1349.

This Court recommends to the District Court that the Motion to Suppress be DENIED.

The parties have ten (10) days from the date of this Report and Recommendation to file their objections, if any, in writing to the Honorable James C. Paine, United States District Court Judge.

DONE and SUBMITTED this 30th day of January, 1990, at West Palm Beach in the Northern Division of the Southern District of Florida.

/s/ Ann E. Vitunac
ANN E. VITUNAC
United States Magistrate

cc:
Glen A. Stankee, Esq.
Joseph E. Bender, AUSA

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-6145-Cr-Paine

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMAL A. KAHOK,
Defendant.

ORDER AFFIRMING MAGISTRATE'S REPORT AND RECOMMENDATION

This cause is before the court on the Report and Recommendation entered on January 30, 1990 by United States Magistrate Ann E. Vitunac (DE 54) and defendant's objections filed on February 22, 1990. The court having reviewed the Magistrate's report and the record in this cause, it is

ORDERED and ADJUDGED that the Magistrate's Report and Recommendation is approved and adopted. The Motion to Suppress is hereby denied.

DONE and ORDERED at West Palm Beach, Florida this 23rd day of February, 1990.

/s/ James C. Paine
United States District Judge

cc: Hon. Ann E. Vitunac
Glen A. Stankee, Esq.
Joseph E. Bender, AUSA

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number: 89-6145-Cr-PAINE

UNITED STATES OF AMERICA

v.

JAMAL A. KAHOK

13915 Greentree Trail
West Palm Beach, FL 33414
(Name and Address of Defendant)
USM #40996-004
SS #272-56-6044

Glen Stankee, Esq. & Robert Forrest, Esq.
One East Broward Blvd.
Suite 1750
Fort Lauderdale, FL 33301
Attorney for Defendant

JUDGMENT IN A CRIMINAL CASE

[Filed Oct. 30, 1990]

THE DEFENDANT ENTERED A PLEA OF:

[☒ guilty ☐nono contendere] as to count(s) ONE, and
☐ not guilty as to count(s) _____

THERE WAS A:

[☒ guilty ☐ verdict] of not guilty as to count(s) ONE. _____.

THERE WAS A:

[☐ finding ☐ verdict] of not guilty as to count(s) — _____.

☐ judgment of acquittal as to count(s) _____.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Attempting to evade or defeat tax, in violation of Title 26 USC Section 7201.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of FOUR (4) YEARS and fined the sum of $75,000.

Further, the defendant is ordered to stand committed until the fine is paid or the defendant is otherwise discharged by due process of law.

It is further ORDERED AND ADJUDGED that execution of sentence of incarceration is deferred, the defendant having posted a supersedeas bond during the period of his appeal.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00—pursuant to Title 18, U.S.C. Section 3013 for count(s) ONE as follows:

IT IS FURTHER ORDERED THAT counts 2, 3 and 4 are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the Clerk for this district any amount imposed as a fine, or special assessment. The defendant shall

pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

September 19, 1990
Date of Imposition of Sentence

/s/ James C. Paine
Signature of Judicial Officer

James C. Paine
Name and Title of Judicial Officer

October 29, 1990
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date
_____, the institution designated by the Attorney General with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN JUDICIAL DISTRICT OF FLORIDA

Magistrate's Case No. 86-4298-SNOW

UNITED STATES OF AMERICA

v.

Premises known as JAMAL & BROTHERS, LTD, Co., 1538 Hammondville Rd., Pompano Beach, Florida, a one story white building with a red roof approximately forty (40) feet east of the store Croft Supermarket, being further described as having the name JAMAL & BROTHERS, LTD Co., painted in red on the west end of the building. The remainder of the building extends east to the auto shop named Pocket Change and is red bricked with large windows and double glass doors.

SEARCH WARRANT ON WRITTEN AFFIDAVIT

TO: Hon. Lurana S. Snow, U.S. Magistrate
299 E. Broward Blvd.
Ft. Lauderdale, Florida 33301

Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that (on the person of) (on the premises known as) Premises known as JAMAL & BROTHERS, LTD CO., 1538 Hammondville Road, Pompano Beach Florida, a one story white building with a red roof approximately forty (40) feet east of the store Croft Supermarket, being further described as having the name JAMAL & BROTHERS,

LTD CO painted in red on the west end of the building. (See * below) in the Southern Judicial District of Florida there is now being concealed certain property, namely Books, records, journals, ledger, bank statements, receipts, invoices, documents, cancelled checks, and other items relating to JAMAL KAHOK, KAHOKS ENTERPRISES, INC, JAMAL & BROTHERS, LTD, CO, CROFT SUPERMARKET, JIMMYS SUPERMARKET, PALS SUPERMARKET, and SAXON WALL SUPERMARKET, evidencing the obtaining, transferring, and/or concealment of income, expenses, assets and expenditures of money, which are fruits, evidence of instrumentalities of criminal offenses against the United States, namely attempts to evade of defeat Federal income taxes in violation of 26 U.S.C. 7201, subscribing to fraudulent return in violation of 26 U.S.C. 7206(1), and conspiring to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Treasury Department in the collection of income taxes in violation of 18 U.S.C. 371.

Note: Documentary evidence is limited to the period from January 1, 1980 through and including December 31, 1985.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

YOU ARE HEREBY COMMANDED to search on or before of August 21, 1986 (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime—6:00 A.M. to 10:00 P.M.) and if the property be

---

* The remainder of the building extends east to the auto shop named Pocket Change and is red bricked with large windows and double glass doors.

found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to Lurana S. Snow, U.S. Magistrate as required by law.

Name of Affiant
Christine M. Jackson

Signature of Judge or U.S. Magistrate
Lurana S. Snow

Date/Time Issued
8/11/86

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN JUDICIAL DISTRICT OF FLORIDA

Magistrate's Case No. 86-4297-SNOW

UNITED STATES OF AMERICA

v.

Premises known as CROFT SUPERMARKET, 1547 Hammondville Road, Pompano Beach, Florida, being further described as a one story grocery store painted light and dark orange with the name CROFT SUPERMARKET written in blue letters on the front of the building

---

SEARCH WARRANT ON WRITTEN AFFIDAVIT

TO: Hon. Lurana S. Snow, U.S. Magistrate
299 E. Broward Blvd.
Ft. Lauderdale, Florida 33301

Affidavit(s) having been made before me by the below-named affiant that he she has reason to believe that (on the person of) (on the premises known as) Premises known as CROFT SUPERMARKET, 1547 Hammondville Road, Pompano Beach, Florida, being further described as a one story grocery store painted light and dark orange with the name CROFT SUPERMARKET written in blue letters on the front of the building, in the Southern Judicial District of Florida there is now being concealed certain property, namely Books, records, journals, ledgers, bank statements, receipts, invoices, documents, cancelled checks, and others items relating to JAMAL KAHOK, KAHOKS ENTERPRISES INC, JAMAL & BROTHERS, LTD, CO, CROFT SUPERMARKET, and

NOFAL KAHOOK, evidencing the obtaining, transferring and/or concealment of income, expenses, assets and expenditures of money, which are fruits, evidence or instrumentalities of criminal offenses against the United States, namely attempts to evade or defeat Federal income taxes in violation of 26 U.S.C. 7201, subscribing to a fraudulent return in violation of 26 U.S.C. 7206(1), and conspiring to defraud the United States by impeding, impairing, obstructing and defeating the lawful function by the Treasury Department in the collection of income taxes in violation of 18 U.S.C. 371.

Note: Documentary evidence is limited to the period from January 1, 1980 through and including September 31, 1985.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

YOU ARE HEREBY COMMANDED to search on or before of August 21, 1986 (not to exceed 10 days) (the person or place named above for the property specified, serving this warrant and making the search (in the daytime—6:00 A.M. to 10:00 P.M.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return his warrant to Lurana S. Snow, U.S. Magistrate as required by law.

Name of Affiant
Christine M. Jackson

Signature of Judge or U.S. Magistrate
Luarana S. Snow

Date Ttime Issued
8/11/86

APPENDIX G

AFFIDAVIT

I, Christine M. Jackson, Special Agent, Internal Revenue Service, U.S. Department of Treasury, being duly sworn, state:

1. I make this affidavit in support of an application for issuance of search warrant for the following premises as described more fully in Attachment I:

   JAMAL & BROTHERS, LTD. CO.
   1538 Hammondville Rd.
   Pompano Beach, FL

2. There is probable cause to believe that now located at these premises are the fruits, evidence and instrumentalities of criminal offenses against the United States, namely, attempts to evade or defeat Federal income tax in violation of Title 26, United States Code, Section 7201, subscribing to fraudulent tax returns in violation of Title 26 United States Code Section 7206(1) and conspiring to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Treasury Department in the collection of income taxes in violation of Title 18, United States Code, Section 371.

3. *Background of Affiant & Origin of Investigation*

   I have worked in the criminal investigation field for four years and have been a Special Agent of the Internal Reevnue Service (IRS) since June 1984. Trained in financial investigation techniques and accounting, I have conducted and participated in numerous investigations of criminal violations of the Internal Revenue Code and related criminal offenses.

From November 1985, to present, I have conducted and supervised an IRS investigation of potential criminal tax violations by JAMAL A. KAHOK, KAHOKS ENTERPRISES INC. and JAMAL & BROTHERS, LTD. CO. KAHOK is president and sole shareholder of both KAHOKS ENTERPRISES INC. and JAMAL & BROTHERS, LTD. CO.

During the course of this investigation, information was developed which indicated that another individual, namely NOFAL KAHOOK, along with others still unknown to the government have conspired together with JAMAL A. KAHOK and his corporation, KAHOKS ENTERPRISES INC. using methods later described more fully herein in order to obstruct the IRS in its lawful collection of income taxes.

This affidavit is based upon my personal knowledge, information related to me by other law enforcement Agencies, witnesses' testimony and information given to me by a source who wishes to remain anonymous.

4. On the basis of this information, I submit that there is probable cause to believe that the taxpayers named above have been and are now, involved in a scheme to conceal from the IRS the diversion of money from their business entities to their personal benefit with a purpose to evade and defeat the payment of their Federal income taxes by filing false and fraudulent individual and corporate tax returns. Affiant submits that the taxpayers named above kept and maintained two sets of books and records, skimmed business receipts, failed to report and or keep records of income received from check cashing services and fraudulent coupon redemptions, deliberately concealed true ownership of their business entities, submitted false documents under oath, used funds in business accounts to purchase personal assets, and gave false and misleading statements to Special Agents of the IRS.

5. *Description of Taxpayers*

JAMAL KAHOK is now President and sole shareholder of KAHOKS ENTERPRISES INC. and JAMAL AND BROTHERS LTD. CO. KAHOK operates both of these businesses out of an office located within the premises of CROFT SUPERMARKET, 1547 Hammondville Road, Pompano Beach, FL and the building adjacent to CROFT SUPERMARKET, 1538 Hammondville Road, Pompano Beach, FL. Throughout the years under investigation, KAHOK bought and sold various businesses and commercial real properties as reflected by the following schedule:

Property	Purchased On Or About	Sold On Or About
Buy Rite Market 1800 W. Broward Blvd. Ft. Lauderdale	09/80	03/81
Family Market 3081 N.W. 19th St. Ft. Lauderdale	07/81	05/84
Marshalls Food Market 1413 N.W. 27th St. Ft. Lauderdale	10/82	03/84
Miller Grocery 5723 S.W. 23rd St. Hollywood, Fl	11/82	03/84
Croft Supermarket 1547 Hammondville Rd. Pompano Beach, Fl	01/83	Still Owns
Saxon & Wall Supermarket 321 N.W. 3rd Ave. Pompano Beach, Fl	11/84	Still Owns
Pals Supermarket 401 N.W. 27th Ave. Pompano Beach, Fl	03/84	03/86
Jimmys T Supermarket 91 N.W. 34th Ave. Ft. Lauderdale, Fl	06/84	10/85

KAHOK created and incorporated two companies in 1983, KAHOKS ENTERPRISES INC. and JAMAL AND BROTHERS, LTD CO. In 1984, KAHOK consolidated the assets and inventories of the grocery stores, CROFT SUPERMARKET, SAXON & WALL SUPERMARKET, PALS SUPERMARKET and JIMMYS I SUPERMARKET into KAHOKS ENTERPRISES INC. The title to the land on which these stores reside and the responsibility for the management of this land was given to JAMAL & BROTHERS LTD CO. Therefore, the stores which comprise KAHOKS ENTERPRISES INC. lease the land and make monthly payments to JAMAL & BROTHERS LTD CO. KAHOK has also purchased numerous pieces of investment property throughout Florida in his own name.

In 1985, JAMAL KAHOK and NOFAL KAHOOK formed another corporation KAHOKS INTERNATIONAL INC., also located at 1547 Hammondville Road, Pompano Beach, FL. JAMAL is listed as the president and treasurer: NOFAL, the vice president and secretary. The exact nature of the business is unknown at this time.

NOFAL KAHOOK is JAMAL KAHOK's cousin. From 1980 to the present, analysis of available records reveal NOFAL purchased partial interest in various business properties owned by JAMAL KAHOK and then later bought out the remainder of JAMAL's interest as shown by the schedule:

Property	Purchased On or About	Percentage Purchased	Business Partner
Family Market 3081 N.W. 19 St. Ft. Lauderdale, FL	03/82 03/84	50% Remaining 50%	JAMAL —
Marshalls Food Market 1413 N.W. 27 St. Ft. Lauderdale, FL	12/82 03/84	50% Remaining 50%	JAMAL —

However, witness testimony indicates that NOFAL KAHOOK is a silent partner with JAMAL KAHOK and receives some profit from CROFT SUPERMARKET and other business entities related to JAMAL KAHOK.

6. *Background of Source X (SX)*

This affidavit is based, in part, on information imparted directly to me in personal interviews with a source referred to throughout this affidavit as SX. SX is a U.S. citizen, who has no known criminal record and has not received any rewards or inducements for the information provided. On July 14, 1986, SX appeared at the IRS. Criminal Investigation Division, 299 E. Broward Blvd., Fort Lauderdale, FL, to report that JAMAL A. KAHOK of KAHOKS ENTERPRISES INC. was not reporting or paying his employment taxes properly. Special Agent Stanley Young took the initial information from SX and SX left the office. Later, this affiant recontacted SX for additional information.

SX was an employee of JAMAL KAHOK and KAHOKS ENTERPRISES, INC. for approximately two years. SX was recently fired by KAHOK. When SX went to apply for Unemployment Compensation, there was no record of SX working for KAHOK. Upon confronting KAHOK with this fact, KAHOK stated SX was never on the reported payroll. Subsequently, SX came to the IRS to report KAHOK and to obtain information on how to file a 1986 tax return if KAHOK does not give SX a W-2 for 1986.

SX worked at several different stores during SX's employment with KAHOK. At one time SX was reasonible for the daily operation of the grocery store. One of SX's duties was to create and maintain in Arabic the original cash receipts and disbursements

journal. SX was in frequent contact with other employees from KAHOK's grocery stores. KAHOK instructed all employees to follow the same operational procedures.

SX has been inside the business premises described above numerous times. SX has described the layout of the store, the office, the types of records maintained and the location of these records within the store. This affiant, Division of Alcoholic Beverages & Tobacco files and other witnesses later to be named within, independently corroborated portions of information provided by SX. SX was not explained IRS reward policy nor has SX given any indication to date of requesting remuneration for the information provided. SX wishes to remain anonymous because JAMAL KAHOK and his extended family are very wealthy and powerful in South Florida. SX fears physical harm if KAHOK learns that SX provided information to the IRS. KAHOK does have a prior history of violence. He was arrested by Ft. Lauderdale Police Department in September of 1984 for aggravated assault.

7. *Summary of Investigation*

This affiant examined JAMAL KAHOK's 1980-1984 1040 Federal income tax returns, (Exhibits A1-A5), 1984 1120 Corporate tax return for KAHOKS ENTERPRISES INC. (Exhibit B1), Public Record Information and Witness Testimony. Using the net worth method of proof, the analysis of the information available to date shows KAHOK's net worth increased $562,031.52 from 1980 to 1984. A preliminary net worth computation based on information available as of 7/17/86 is given below:

Table I

	1980	1981	1982	1983	1984
Assets	$201,449.00	$331,731.49	$646,912.31	$978,677.25	$1,528,591.61
Liabilities	118,960.67	152,003.18	374,389.35	501,206.92	877,609.62
Depreciation	1,225.93	2,729.42	9,198.76	12,257.00	7,920.00
Net Worth	$ 81,262.40	$176,998.89	$263,324.20	$465,213.33	$ 643,061.99
Less: Prior Year Net Worth		81,262.40	176,998.89	263,324.20	465,213.30
Increase in Net Worth		$ 95,736.49	$ 86,325.31	$201,889.13	$ 177,848.60

The investigation to date further reveals that KAHOK's tentative additional taxable income is as follows:

TABLE II

	1981	1982	1983	1984
Corrected Taxable Income	$97,041.93	$89,063.63	$191,511.55	$116,811.05
Less: Taxable Income Reported	6,421.05	3,964.01	18,070.00	16,080.00
Additional Taxable Income	$90,620.88	$85,099.62	$173,441.55	$100,731.05

The affiant submits that the additional taxable income reflected in Table II is the result of the diversion of business receipts by JAMAL KAHOK, his related business entities and NOFAL KAHOOK.

8. *Omission of Business Receipts*

All business receipts of JAMAL KAHOK's business entities are not reflected in the records presented to the accountants who prepare the tax returns. A double set of records is maintained to reflect the real business receipts and expenses. This is indicated by the following evidence:

I Non-reporting of Business Receipts

(1) SX was an employee of JAMAL KAHOK and KAHOKS ENTERPRISES INC. until July 13, 1986.

He states:

a. During his employment, KAHOK instructed him to follow certain procedures when closing out the store's cash registers at the end of the day.

b. He was instructed to close out the registers and to transfer the total sales figures in Arabic to a ledger maintained in the Arabic language. Exhibit C1 is a sketch provided

by SX of the type of Arabic ledger which is maintained in each of KAHOK's stores.

c. The five headings of the ledger pages are read from right to left and are roughly translated as "day of the week", "date", "total sales", "expenses" and "comments".

d. KAHOK would call the store daily to ask SX what the total sales were for the day. KAHOK would then arbitrarily reduce the total sales figure by 40% to 60% and instruct him to record this reduced figure on the yellow monthly record of receipts summary sheet provided by KAHOK's accountant. Exhibit D1 has been identified by SX as a representative copy of one of the yellow summary sheets which KAHOK instructed him to record the false daily business receipts.

e. Every month, KAHOK would collect the yellow record of receipts sheets from each store. The ledgers maintained in Arabic remained in the store's office. There was no separate ledger for each year. A ledger is used until filled regardless of the tax year. Some books contain records for two years.

(2) *Allison Craig*, a secretary at CROFT SUPERMARKET, was interviewed on May 13, 1986. Although Craig appears to be a hostile witness, she corroborated the existence of the ledgers described by SX. She stated:

a. She has worked at CROFT SUPERMARKET since 1977. JAMAL KAHOK bought CROFT SUPERMARKET in 1983.

b. JAMAL KAHOK and NOFAL KAHOOK both own and operate CROFT SUPERMARKET.

c. After the cashiers close out the registers for the day, NOFAL KAHOOK makes entries into the ledger showing the total cash sales. The cash register tapes are thrown away.

d. The ledger is kept in the store's office inside the desk.

(3) *Nofal Kahook*, listing himself as "Secretary-Treasurer" or "President" of CROFT SUPERMARKET, SAXON & WALL SUPERMARKET and PALS SUPERMARKET in applications submitted on behalf of KAHOKS ENTERPRISES, INC. to Coupon Redemption, Inc., certified that CROFT SUPERMARKET had approximately $2.4 million in annual sales (Exhibit E1), that SAXON & WALL SUPERMARKET had approximately $830,000 in annual sales (Exhibit E2) and that PALS SUPERMARKET had approximately $770,000 in annual sales (Exhibit E3). These amount to $4 million dollars in annual sales. The U.S. Corporation Income Tax Return filed by KAHOKS ENTERPRISES, INC. for the year 1984 reflects $1,942,660.49 in total gross receipts (Exhibit B1). The amount reflected on the tax return is only 49% of the sales figures submitted to Coupon Redemption, Inc. KAHOKS ENTERPRISES, INC. is composed of the three abovementioned stores plus JIMMYS I SUPERMARKET.

(4) *Richard M. Harris*, Vice President, S.E. Frankford and Associates, the firm which has prepared the income tax returns of JAMAL KAHOK and KAHOKS ENTERPRISES INC. since 1982 stated:

a. It was company practice for a representative of the company to discuss with their clients

what items were necessary to properly report business income for tax purposes. Either Jim Robertson, a former employee of S.E. Frankford and Assoc. or Harris himself would have discussed this issue with KAHOK.

b. Harris only received the monthly record of receipts yellow summary sheets from KAHOK as documentation of his business receipts. Harris did not ask KAHOK why KAHOK never gave Harris the cash register tapes which support the figures on the summary sheets.

(5) At the outset of this investigation, JAMAL KAHOK was requested to provide this affiant with all records of receipts and expenses for his businesses. He provided only the yellow record of receipts summary sheets as documentation of his business receipts. Revenue Agent Erwin Dillman of the Internal Revenue Service, has analyzed these record of receipts summary sheets and found that the total receipts reflected on the summary sheets correlate to the amounts reported by JAMAL KAHOK as gross receipts his personal returns or on those of KAHOKS ENTERPRISES, INC. The ledgers reflecting the true income and expenses were not provided to this affiant.

II. *Omission of Income from Fraudulent Coupon Redemptions*

(1) *SX*, the former employee of KAHOKS ENTERPRISES INC. states:

a. KAHOK's stores do not take coupons from customers. However, KAHOK would receive at least $2,000-$4,000 in checks per month at each store from coupon redemption com-

panies. CROFT SUPERMARKET would receive approximately $20,000 in redemption checks per month. KAHOK's total monthly receipts from these checks was about $30,000.

b. KAHOK instructed employees to deposit any checks received from coupon redemption companies in the grocery store's bank account. (Exhibit K1) KAHOK further instructed them to write a check drawn on the grocery store account payable to cash in the exact amount of the deposited check from the coupon company. The employees were then to give these checks to cash directly to JAMAL KAHOK.

(2) *Ron Williams*, Special Agent—U.S. Postal Inspectors, Miami Office, stated:

a. JAMAL KAHOK and NOFAL KAHOOK were among numerous individuals under investigation by the State of Florida and the U.S. Postal Service for fraudulently cashing in millions of dollars of discount coupons over a three year period from 1983 to 1986.

b. These grocers would buy newspapers in bulk and clip out the coupons for redemption.

c. Both JAMAL KAHOK and NOFAL KAHOOK were arrested in April of 1986 and charged with racketeering, grand larceny and fraud.

(3) *Fred Bartlett*, former accountant for JAMAL KAHOK, 1980-1981, stated:

a. Bartlett prepared KAHOK's 1980 and 1981 1040 Individual Tax Returns.

b. Bartlett would always question KAHOK thoroughly regarding possible additional sources of income.

c. Once while at KAHOK's store, Bartlett noticed a lot of newspapers stacked against the wall. Bartlett asked KAHOK what he was going to do with the papers but KAHOK would not answer.

d. Since KAHOK would not discuss the issue, there are no entries on KAHOK's 1980 or 1981 tax returns reflecting receipts from coupon redemption companies.

(4) *Richard M. Harris*, Vice President, S.E. Frankford and Associates, the firm which has prepared KAHOK's tax returns since 1982 stated:

a. Harris and KAHOK never discussed the receipt of checks from coupon redemption companies.

b. It was company practice for a representative of the company to discuss with their clients what items were necessary to properly report business income for tax purposes.

III. *Diversion of Business Receipts*

During the year 1983, JAMAL KAHOK incorporated JAMAL & BROTHERS, LTD, CO. in Florida. KAHOK is the president and sole shareholder of the corporation according to his testimony. According to the Broward County real property records, this corporation has purchased several pieces of real estate in Broward County.

a. During an interview with JAMAL KAHOK, KAHOK stated that JAMAL & BROTHERS, LTD, CO. was a real estate investment company purchasing land for the Nahar family from Jordan. He stated that the Nahars send him $50,000 to $70,000 at a time, which he deposits only into the JAMAL & BROTHERS, LTD, CO. bank account.

b. Bank records of JAMAL & BROTHERS, LTD, CO. were analyzed for the period of February through June of 1984 and reflected that $11,759.75 was deposited in currency, $10,152.06 was deposited from rents received and $44,000.00 were funds transferred from the bank account of CROFT SUPERMARKET. There were no deposits from the Nahar family or from any foreign sources.

c. JAMAL & BROTHERS, LTD, CO. receives rental income from its properties and from KAHOKS ENTERPRISES, INC. for the rental of the properties wherein CROFT SUPERMARKET and SAXON & WALL SUPERMARKET are located.

d. JAMAL KAHOK stated that JAMAL & BROTHERS, LTD, CO. filed federal income tax returns. Internal Revenue Service records show no returns have been filed by JAMAL & BROTHERS, LTD, CO. for either of the years 1984 or 1985.

e. On November 20, 1985, JAMAL KAHOK was requested to produce all records of income, expenses, asset purchases and asset sales for the years 1980 through 1984, however, KAHOK provided no records of JAMAL & BROTHERS, LTD, CO.

f. A work file containing partial documentation of asset purchases by JAMAL & BROTHERS, LTD, CO. was received from S.E. Frankford and Associates. This file also included a request by KAHOK stating he wanted to cancel his JAMAL & BROTHERS, LTD, CO. account with S.E. Frankford and Associates, but wanted to continue to main-

tain his KAHOKS ENTERPRISES INC. account with the firm.

9. Obstruction of the lawful function of the Internal Revenue Service

JAMAL KAHOK, NOFAL KAHOOK, KAHOKS ENTERPRISES INC. and JAMAL & BROTHERS LTD, CO. have conspired together in the following manner in order to impede and obstruct the IRS.

I. Deliberately concealing true ownership of business properties.

The taxpayers named above intentionally made false statements to investigating agents, provided false documents under oath to Division of Alcoholic Beverages & Tobacco investigators and repeatedly manipulated ownership of property amongst themselves to thwart efforts by the IRS to examine and ascertain their correct taxable income.

During an interview with JAMAL KAHOK on November 20, 1985, KAHOK stated he and NOFAL KAHOOK each bought 50% ownership in Marshalls Food Market in October of 1982. In March of 1984, JAMAL KAHOK sold NOFAL KAHOOK his 50% interest in the business. Division of Alcoholic Beverages & Tobacco files support these statements by KAHOK. JAMAL KAHOK's individual tax returns for 1982 and 1983 do not reflect any income from Marshalls Food Market. However, NOFAL KAHOOK's individual tax return for 1983 (Exhibit F1) reports income from Marshall's Food Market and states NOFAL KAHOOK is sole proprietor of this store.

JAMAL KAHOK stated he is President and sole owner of KAHOKS ENTERPRISES INC. However, Allison Craig stated JAMAL KAHOK and NOFAL

KAHOOK each own 50% of CROFT SUPERMARKET. SX stated JAMAL and NOFAL each own 50% of CROFT SUPERMARKET plus each own 50% of the other stores which comprise KAHOKS ENTERPRISES, INC.

JAMAL KAHOK also stated he never owned an interest in KAHOOK's MARKET, 1905 N.W. 21st Avenue, Ft. Lauderdale, Florida. KAHOK said this business was owned by his uncle, NOFAL KAHOOK'S father, Dakhlallah Kahook. However, in an application to Division of Alcoholic Beverages & Tobacco, KAHOK stated under oath he was co-owner of KAHOOK's MARKET from 1980-1981. (Exhibit G1) In addition, SX stated JAMAL KAHOK and Dakhlallah Kahook were partners in KAHOOK's MARKET until 1983. In 1983 they had an argument and Dakhlallah gave JAMAL $130,000 to get out of the business. JAMAL used this money to purchase CROFT SUPERMARKET. Furthermore, KAHOK's tax returns do not indicate any percentage of ownership in KAHOOK's MARKET.

JAMAL KAHOK told the Division of Alcoholic Beverages & Tobacco under oath that he purchased CROFT SUPERMARKET for $50,000.00 by using $15,000.00 of his own personal funds and $35,000 loan from Dakhlallah Kahook. JAMAL presented Beverage investigators with a contract between himself and the seller, William DeWitt, stating the purchase price was $50,000 (Exhibit H1). William DeWitt stated KAHOK purchased CROFT SUPERMARKET for $180,000. DeWitt received $130,000 from KAHOK in cashier checks and took a $50,000 mortgage. DeWitt does not recall signing the contract which KAHOK gave to the Beverage investigators. DeWitt thought it could have been a preliminary contract between himself and KAHOK. DeWitt provided this affiant with the authentic con-

tract of sale, dated 12/10/82 showing a purchase price of $180,000 (Exhibit J1).

II. Creating and Maintaining two sets of books and records.

The taxpayers named above acted together through their employees to create and maintain a double set of books and records to conceal the diversion of business funds to personal use. SX stated the sales and expense ledgers are written in Arabic so that they cannot be examined or understood by English speaking officials.

III. Failing to produce the original books and records.

On November 20, 1985, this affiant asked JAMAL KAHOK to make available all books and records which documented income received from any source and expenses the years 1980-1984. KAHOK was also told to include documentation of assets purchased and sold and personal expenses. On December 18, 1985, this affiant received the books and records of JAMAL KAHOK and his business entities. These records included monthly record of receipts summary sheets, invoices, bank statements and cancelled checks for each of KAHOK's grocery stores. These records also reconcile to the figures reported on KAHOK's income tax returns. These records did not contain the cash receipts and disbursements ledger mentioned by SX and Allsion Craig, any personal bank account information nor any documentation of assets.

Although, Public Records show substantial assets purchased by KAHOK's real estate investment company, JAMAL & BROTHERS, LTD CO., there were no records nor documentation provided to this affiant which showed the existence of or any financial activity by JAMAL & BROTHERS, LTD CO.

10. *Location of Documents*

JAMAL & BROTHERS, LTD. CO.
1538 Hammondville Rd.
Pompano Beach, FL (Exhibit J1)

On November 20, 1985, this affiant requested records of SAXON & WALL SUPERMARKET, CROFT SUPERMARKET, PALS SUPERMARKET and JIMMYS SUPERMARKET, among other records, from JAMAL KAHOK.

On December 5, 1985, this affiant spoke with Richard Harris, KAHOK's accountant, to arrange the pick-up of KAHOK's books and records which were requested on November 20, 1985. Harris stated that the records were in storage at "CROFTS" and he was going over there Saturday (December 7, 1985) to go through the records with KAHOK so that only records pertaining to the years under investigation were given to the IRS. Harris said there were approximately fifteen (15) boxes of records. This affiant offered to pick up the boxes on location but Harris refused stating he would take the boxes to his office and I could pick them up there. On December 18, 1985, I received four (4) boxes of records from Harris at the offices of S.E. Frankfort and Associates. The records received included records from CROFT SUPERMARKET, PALS SUPERMARKET, and JIMMYS SUPERMARKET.

SX stated KAHOK stores records in the building adjacent to CROFT SUPERMARKET. SX described this building to be the one next to the Auto Body Shop with JAMAL & BROTHERS, LTD. CO. written on the outside wall. SX was inside this building several times approximately seven (7) months ago and observed some stock from CROFT SUPERMARKET and thick file folders in open file cabinets. SX also stated that he never saw any boxes of rec-

ords stored inside the office of CROFT SUPERMARKET.

11. Because of the ongoing nature of the business, and the personal observations of SX regarding types of records maintained and their location this affiant has probable cause to, this affidavit has probable been maintained and are currently kept at the premises described above by employees of KAHOKS ENTERPRISES INC. under the direction of JAMAL KAHOK and NOFAL KAHOOK.

12. Wherefore, this affiant respectfully requests issuance of a search warrant for documents, books and records, as described in Attachment I, which constitute evidence and instrumentalities of violations of Title 26 United States Code Sections 7201 and 7206(1) and any and all fruits, instrumentalities and evidence (at this time unknown) of the crimes of conspiracy, attempts to evade or defeat Federal income tax and subscribing to false and fraudulent income tax returns, and impeding, impairing obstructing and defeating the lawful functions of the Treasury Department in the collection of income taxes in violation of Title 18 United States Code Section 371 as presented by the facts recited in this affidavit.

/s/ Christine M. Jackson
CHRISTINE M. JACKSON
Special Agent
Criminal Investigation Division
Internal Revenue Service
U.S. Department of Treasury

Subscribe and sworn to before me this 11th day of August, 1986.

/s/ Lurana S. Snow
United States Magistrate
for the Southern District of Florida

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 89-6145
26 U.S.C. § 7201
26 U.S.C. § 7206(1)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMAL A. KAHAK,
Defendant.

The Grand Jury charges:

COUNT I

That on or about the 8th day of August, 1983, in the Southern District of Florida,

JAMAL A. KAHOK,

a resident of Plantation, Broward County, Florida, who during the calendar year 1982 was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him and his spouse to the United States of America for the calendar year 1982, by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent joint U.S. Individual Income Tax Return, Form 1040, on behalf of himself and his spouse, which was filed with the Internal Revenue Service, wherein it was stated that their joint taxable income for said calendar year was the sum of $3,964.01, and that the amount of tax due and

owing thereon was the sum of $2,462.60, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was the sum of $112,478.87, upon which said joint taxable income was owing to the United States of America an income tax of $27,798.00.

In violation of Title 26, United States Code, Section 7201.

COUNT II

That on or about the 15th day of April, 1984, in the Southern District of Florida,

JAMAL A. KAHOK,

a resident of Plantation, Broward County, Florida, who during the calendar year 1983, was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him and his spouse to the United States of America for the calendar year 1983, by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, on behalf of himself and his spouse, which was filed with the Internal Revenue Service, wherein it was stated that their joint taxable income for said calendar year was the sum of $18,070.00, and that the amount of tax due and owing thereon was the sum of $2,222.00, whereas, as he then and there well knew and believed, their joint taxable income and for the said calendar year was the sum of $269,810.91, upon which said joint taxable income there was owing to the United States of America an income tax of $102,497.00.

In violation of Title 26, United States Code, Section 7201.

COUNT III

That on or about the 15th day of April, 1985, in the Southern District of Florida,

JAMAL A. KAHOK,

a resident of Plantation, Broward County, Florida, who during the calendar year 1984 was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him and his spouse to the United States of America for the calendar year 1984, by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, on behalf of himself and his spouse, which was filed with the Internal Revenue Service, wherein it was stated that their joint taxable income for said calendar year was the sum of $16,080.00, and that the amount of tax due and owing thereon was the sum of $2,004.00, whereas, as he then and there well knew and believed, their joint taxable income for the said calendar year was the sum of $41,679.91, upon which said joint taxable income there was owing to the United States of America an income tax of $8,411.00.

In violation of Title 26, United States Code, Section 7201.

COUNT IV

That on or about the 21st day of June, 1985, in the Southern District of Florida,

JAMAL A. KAHOK,

a resident of Plantation, Broward County, Florida, did willfully make and subscribe a U.S. Corporate Income Tax Return, Form 1120, for Kahoks Enterprises, Inc., for the calendar year 1984, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said U.S. Corporate Income Tax Return he did not believe to be true and correct as to every material matter in that the said U.S. Corporate Income Tax Return reported gross receipts in the sum of $1,942,660.49,

whereas, as he then and there well knew and believed, Kahoks Enterprises, Inc., received gross receipts in addition to that heretofore stated.

In violation of Title 26, United States Code, Section 7206(1).

A TRUE BILL

/s/ [Illegible]
Foreperson

/s/ [Illegible]
DEXTER W. LEHTINEN
United States Attorney

DAVID H. BEITZ
MICHAEL F. GALLAGHER
Special Attorneys
Tax Division
Department of Justice

No. 91-586

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMAL A. KAHOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
YOEL TOBIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the search warrants in this case satisfied the particularity requirement of the Fourth Amendment.

2. Whether the district court made a *de novo* determination as to those portions of the magistrate's report to which petitioner objected.

3. Whether the magistrate's denial of petitioner's request for production of witness notes and interview memorandums at a suppression hearing violated the Due Process Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-586

JAMAL A. KAHOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is unreported, but the judgment is noted at 943 F.2d 1318 (Table). The order of the district court (Pet. App. 12a) adopting the magistrate's report and recommendation (Pet. App. 2a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1991. The petition for a writ of certiorari was filed on October 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement in which he reserved the right to appeal the denial of his motion to suppress evidence, petitioner pleaded guilty to one count of tax evasion, in violation of 26 U.S.C. 7201. He was sentenced to 48 months' imprisonment. The court of appeals affirmed. Pet. App. 1a.

1. Petitioner was charged with willfully attempting to evade income taxes for the year 1982, 1983, and 1984, in violation of 26 U.S.C. 7201, and with willfully making and subscribing a false 1984 corporate income tax return, in violation of 26 U.S.C. 7206(1). Pet. App. 41a-44a. After indictment, petitioner filed a motion to suppress evidence that was obtained as a result of three warrant-authorized searches. Petitioner's motion alleged that affidavits filed by an IRS special agent in support of the warrants contained allegations that the agent knew or should have known were false.[1] Petitioner also contended that the warrants failed to describe the items to be seized with sufficient particularity. Pet. App. 11a.

2. The district court referred petitioner's motion to a magistrate. Pet. App. 2a. The magistrate conducted a hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978), and issued a report and recommendation that petitioner's suppression motion be denied. Pet. App. 2a-11a. The magistrate found that the testimony of petitioner's witnesses at the hearing was "not only woefully lacking in substance, it was woefully lacking in truth." Pet. App. 10a. The mag-

---

[1] One of the affidavits is reproduced at Pet. App. 22a-40a. The affidavits supporting the other two warrants were basically the same. Pet. App. 3a.

istrate found that the testimony of one witness "was replete with conflicts and inconsistencies," Pet. App. 7a, and recommended that the government pursue perjury charges against another witness. Pet. App. 10a. The magistrate also rejected petitioner's contention that the search warrants were too general. The magistrate observed that an investigation of complex crimes may require review of large numbers of documents, and that "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection." Pet. App. 11a (quotations omitted).

On February 22, 1990, petitioner filed objections to the magistrate's report and a motion for a new hearing. On February 23, 1990, the District Court entered an order adopting the magistrate's report and denying petitioner's motion to suppress. Pet. App. 12a.

3. On petitioner's appeal from his conviction, the court of appeals affirmed without opinion. Pet. App. 1a.

ARGUMENT

1. Petitioner contends (Pet. 9-18) that the search warrants did not describe the items to be seized with sufficient particularity. In order to prevent government officials from engaging in "a general, exploratory rummaging in a person's belongings," the Fourth Amendment requires that search warrants contain "a 'particular description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). "It is universally recognized," however, "that the particularity requirement must be applied with a practical margin of flexibility, * * * and that a description of property will be acceptable if it is as specific as the circumstances and nature of the activity under investigation permit." *United States* v.

Wuagneux, 683 F.2d 1343, 1349 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983). See also *United States* v. *Strand*, 761 F.2d 449, 453 (8th Cir. 1985); *Shaffer* v. *Wilson*, 523 F.2d 175, 180 (10th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

The search warrants in this case authorized the government to search at three specified locations for "[b]ooks, records, journals, ledgers, bank statements, receipts, invoices, documents, cancelled checks, and other items" relating to petitioner and other named persons and entities "evidencing the obtaining, transferring, and/or concealment of income, expenses, assets and expenditures of money, which are fruits, evidence o[r] instrumentalities of criminal offenses * * *, namely [income tax evasion (26 U.S.C. 7201), subscribing to a fraudulent return (26 U.S.C. 7206(1)), and conspiracy to defraud the United States by impeding the Treasury Department in the collection of income taxes (18 U.S.C. 371)]." Pet. App. 18a, 20a-21a.[2] The warrants further stated that "[d]ocumentary evidence is limited to the period from January 1, 1980 through and including" September 31, 1985, or December 31, 1985. Pet. App. 18a, 21a. The search warrants thus restricted the search to records that concerned specific persons and entities, particular types of transactions and activities, a limited time period, and specified criminal offenses.

The warrants were framed as narrowly as possible to allow the government to investigate petitioner's alleged criminal activity. This Court has recognized that proof of complex white collar criminal schemes

---

[2] The third warrant in this case, which is not reproduced in petitioner's appendix, is similar to the other two.

often requires investigators to examine and assemble many bits of evidence "[l]ike a jigsaw puzzle." *Andresen* v. *Maryland*, 427 U.S. 463, 481 n.10 (1976). In such cases, "the whole 'picture'" of the illegal scheme can "be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little." *Ibid.* The affidavits in this case described an extensive and complex scheme of fraud and evasion. According to the affidavits, petitioner kept two sets of books, Pet. App. 26a-27a, 29a-30a; failed to report about $30,000 per month in fraudulent coupon redemptions, Pet. App. 32a-34a; made false statements to investigators concerning the ownership of business properties as part of a conspiracy to impede the IRS, Pet. App. 36a-38a; and provided investigators with a phony contract that grossly understated the purchase price of a grocery store. Pet. App. 37a-38a. Given the complexity and extent of these alleged activities, and the evidence that petitioner had engaged in massive falsification of business records, the search warrants were as specific as it was possible for them to be.

Petitioner asserts (Pet. 11) that the warrants should have restricted the searchers to documents relating to income. But the government needed information concerning petitioner's assets, expenses, and expenditures to reconstruct his tax liability and to trace the steps petitioner took to hide his income and assets. Petitioner's assertion (*ibid.*) that the government lacked probable cause to seize documents relating to Jamal & Brothers, Ltd., ignores evidence that petitioner had diverted business receipts to Jamal & Brothers, Ltd., and then attempted to mislead an IRS agent about the source of the diverted funds. See Pet. App. 34a-35a. Petitioner also sug-

gests (Pet. 7, 9) that the IRS should have used documents already in its possession to limit the scope of the search, or should have excluded those documents from the scope of the search. But the scope of the warrants was justified in light of evidence that petitioner had provided falsified documents to investigators and had engaged in wholesale fabrication of business records. See Pet. App. 38a.

Because the search warrants were as specific as possible, petitioner errs in asserting (Pet. 9-13) that the decision in this case conflicts with numerous decisions holding that the description of the items to be seized in a search warrant must be as specific as possible under the circumstances.[3] Moreover, there is no basis for petitioner's contention (Pet. 14-18) that the courts of appeals are in conflict over the application of an asserted "exception" to the particularity requirement for businesses that are "permeated with fraud." The courts below did not purport to rely on any such "exception." Moreover, the cases cited by petitioner (see *ibid.*) do not recognize an exception to the particularity requirement, but merely apply the rule that search warrants must be as specific as possible under the circumstances. See, *e.g.*, *United States* v. *Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374 (9th Cir. 1983) (upholding warrant where it is not possible to segregate records evidencing fraud from other records), cert. denied, 465 U.S. 1021 (1984); *United States* v. *Brien*,

[3] That is also the standard applied in the Eleventh Circuit. See *United States* v. *Santarelli*, 778 F.2d 609, 614 (1985). Thus, even if petitioner were correct in arguing that the warrants in this case were too general, he would not be correct in arguing that there is a circuit conflict over the applicable legal standard.

617 F.2d 299, 309 (1st Cir.) (same), cert. denied, 446 U.S. 919 (1980).

Finally, petitioner is incorrect in asserting (Pet. 17) that the facts of this case are indistinguishable from those of *United States* v. *Stubbs*, 873 F.2d 210 (9th Cir. 1989), and *United States* v. *Cardwell*, 680 F.2d 75 (9th Cir. 1982). The warrant in *Cardwell*, unlike the warrant in this case, contained no limitations on the nature of the documents to be seized so long as they constituted evidence of violations of 26 U.S.C. 7201. Moreover, the government's investigation in *Cardwell* focused on particular portions of the defendant's business records that could have been, but were not, described in the warrant. 680 F.2d at 77-78. The warrant in *Stubbs* "was even less descriptive than the warrant[]" in *Cardwell*, because "[i]t contained no reference to any criminal activity." 873 F.2d at 212. And in *Stubbs*, unlike in this case, the court concluded that the government was in a position to describe the items to be seized with greater particularity.[1] *Id.* at 211.

---

[1] Petitioner also urges the Court to grant certiorari to resolve alleged circuit conflicts over whether an affidavit that is not physically attached to a search warrant may limit the scope of a warrant that is otherwise too general, Pet. 18-19, and whether the good faith exception to the exclusionary rule applies to facially invalid warrants, Pet. 20-24. These issues are not properly presented, because they were not considered or decided by the courts below. Those courts decided only that the warrants themselves met the Fourth Amendment requirement of particularity. The government did not suggest that the warrants could be limited by the affidavits, and it mentioned the good faith issue only in a footnote in its brief in the court of appeals. See Gov't C.A. Br. 22 n.13. If the court of appeals had relied on the good faith exception, it would have remanded for further proceedings rather than

2. Petitioner also contends (Pet. 24-26) that the district court failed to comply with 28 U.S.C. 636(b)(1)(B), which requires the court to make a *de novo* determination of those portions of the magistrate's report to which petitioner files a written objection. Petitioner's statement (Pet. 25) that "the order of the district court did not indicate that a *de novo* review of the transcript was conducted" is incorrect. The district court's order states that the court "reviewed the Magistrate's report and the record in this cause." Pet. App. 12a. The record of the case includes the transcript of the suppression hearing.

Petitioner is also incorrect in asserting (Pet. 25) that "a meaningful *de novo* review could not have been conducted" in this case. The magistrate's report was filed on January 30, 1990. The transcript was filed on February 16, 1990. Thus, the district court had ample time to familiarize itself with the record and the report prior to the filing of petitioner's objections on February 22, 1990. Furthermore, the district court's order states that "[t]his cause is before the court on the [Magistrate's] Report and Recommendation * * * and defendant's objections filed on February 22, 1990." Pet. App. 12a. Thus, there is no basis in the record for concluding that the district court failed to review the transcript and petitioner's objections to the magistrate's report.

Petitioner's reliance on *United States* v. *Elsoffer*, 644 F.2d 357 (5th Cir. 1981), is misplaced. In *Elsoffer*, the district court's order did not mention

---

simply affirming the order. See *United States* v. *Accardo*, 749 F.2d 1477, 1481 (11th Cir.), cert. denied, 474 U.S. 949 (1985), appeal after remand, *United States* v. *Norton*, 867 F.2d 1354 (11th Cir.), certs. denied, 491 U.S. 907, 493 U.S. 871 (1989).

the record or the transcript, and a conversation between the district court and defense counsel suggested that the district court had not read the transcript. 644 F.2d at 359 & n.1. The court of appeals remanded because it was "left with uncertainty as to whether the district court read the transcript of the hearing on the motion to suppress." *Id.* at 359. In this case, in contrast, there is no such uncertainty.

3. Finally, petitioner contends (Pet. 26-27) that his due process rights were violated when the magistrate refused to order production of an IRS agent's notes and memorandums of interviews between the agent and a confidential informant who testified as a witness for petitioner at the suppression hearing. Assuming for the sake of argument that *Brady* v. *Maryland*, 373 U.S. 83 (1963), applies to suppression hearings, petitioner had no due process right to production of the notes and memorandums unless they contained information that was favorable to petitioner and "material either to guilt or punishment." *Id.* at 87. See also *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 57 (1987). There is no foundation for petitioner's assertion that the notes and memorandums were *Brady* material. The court of appeals rejected petitioner's due process claim and there is nothing in the record to indicate that the notes and memorandums contained any material evidence favorable to petitioner. In addition, the government reviewed the notes and memorandums and informed the court of appeals that it did not believe they contained any *Brady* material. See Gov't C.A. Br. 49 n.36. Further review is not warranted.[5]

---

[5] Petitioner waived his rights under Fed. R. Crim. P. 12(i) and 26.2 to production of any witness statements contained in these materials. Not only did petitioner fail to file an objec-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
YOEL TOBIN
Attorneys

DECEMBER 1991

---

tion with the district court on this issue, see *Thomas* v. *Arn*, 474 U.S. 140, 147-148 (1985) (rule precluding appellate review of any issue not contained in objections to magistrate's report prevents a litigant from "sandbagging" the district court by failing to object and then appealing), he affirmatively conceded to the district court that he was not entitled to production of the agent's notes. See R. 59, at 27 ("notes of interviews with government witnesses are not technically discoverable at this stage of the proceedings.")

(2) U.S. GOVERNMENT PRINTING OFFICE: 1991 312-234 40192